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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 461

THE APEX SMELTING COMPANY,
Petitioner,

vs.

WILLIAM S. BURNS, RAYMOND J. BURNS AND WILLIAM J. BURNS, II, CO-PARTNERS, DOING BUSINESS AS THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY,
Respondents.

BRIEF FOR RESPONDENTS.

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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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BRIEF FOR RESPONDENTS.

STATEMENT OF FACTS.

A brief statement of facts is deemed necessary to correct inaccuracy and omissions in Petitioner's statement.

The plaintiff relied entirely on the theory of negligence to impose liability for its alleged loss during the proceedings in the Trial Court, and the theory of the plaintiff was clearly stated in the opinion of that Court (Rec. 79, 80):

> "In passing upon the motion to direct and dismiss the action, which was filed shortly after this cause was removed here, the court denied that motion, after reviewing the authorities that were cited here today and certain others cited by both sides, without prejudice to the right of the defendants to renew an appropriate

motion based upon similar grounds at the end of the plaintiff's case.

"The complaint in this case contains no allegation whatsoever of a lack of due care or caution on the part of the defendant in retaining the services of this particular guard, as he is referred to in the plaintiff's complaint, and that fact, in view of the statements that were made in the brief at the time the motion to strike and dismiss was before me, I thought that possibly the proof on behalf of the plaintiff might contain some evidence of lack of due care on the part of the defendant in selecting this particular employee, and if such proof were elicited upon the trial, under our new rules of procedure, the plaintiff would be permitted to amend its complaint to conform with the proof, and it might then be a question.

"It is clear, upon review of the pleadings as it is in now and upon review of the plaintiff's evidence, and after listening to the witnesses as they testified, it is quite clear, both in that review and in the pleadings and in the evidence that this guard, Frontczak, was acting outside of the scope of his employment.

"Here is a guard who is employed and directed partially by the plaintiff and partially by the defendant—true, the employment is that of the defendant—but he is directed partially by both, to protect this property properly. He is directed to walk around the grounds to these various boxes he has to pull, eighteen of them, and I assume from the testimony, although it was not clearly stated, if he noticed anything wrong, he was there to put it right or report it.

"Here is a man whose sole duty is to guard the property, and he deliberately destroys the property. Certainly it cannot be said that was within the scope of his employment, to the extent that the employer is required, under the doctrine of respondeat superior to make good any damages for such deliberate disobedience to order. And that is what we have here. I do not find any conflict at all in the Illinois authorities which have been cited by both sides, on the facts. Many of them can be clearly distinguished from the facts in

this case, but the law is clear in Illinois, and where we have a complete departure from the line of the employment, a complete departure from the employer's orders, a complete departure from the scope of the employment, the employer is not responsible.

"Now, there is no evidence in this case of that, therefore, under the doctrine of respondeat superior, I can see no liability on the part of the defendant.

"Now, as I stated, I thought there might have been some proof introduced here that the defendants were negligent in selecting this employee. They may have been. Personally, I will say this, from looking at him, he does not impress me as being a very intelligent looking character.

"However, possibly the defendants had difficulty in this case, and hired practically anybody who was able to stand up. There was a shortage, and still is, in certain lines of endeavor.

"The defendants possibly, as their counsel urges, were entitled to rely on the fact that this man had held positions with the Government, and apparently had left them of his own volition.

"Whether or not it was their duty to find out that he was once in an institution for the insane, and discharged as cured, if he was cured, I don't know. The record has nothing on that. There is no evidence as to whether he was asked to fill out an application blank. There is no evidence that the plaintiff in this case made any effort to determine whether or not he was a fit person to put in charge of their property, which, under the contract with the defendant, they were entitled to do.

"In fact, the record is completely silent on the one point of negligence that, in my opinion, may have justified this case having gone to the jury and may have justified the jury in making a finding. That is the only point on which I failed to grant, and I deliberately refused to grant defendants' motion when it was made on the pleadings. I have now heard the evidence and the record is still silent on the point. The only point argued here is whether or not this man was within the scope of his employment. Certainly he was not. Since

the plaintiff rests his entire case on that, and on the doctrine of respondeat superior, I find no recourse but to grant defendants' motion. Accordingly the motion is granted and the jury will be instructed to return a verdict for the defendants, and the case is hereby dismissed at plaintiff's cost."

Petitioner contends that his contract theory was advanced in the Trial Court. In this, the Petitioner is confused. When the motion was made for a directed verdict at the close of the Plaintiff's case, and counsel for both sides had presented their respective arguments in support of their respective positions on the motion, the following colloquy took place between the Court and counsel for the Plaintiff (Rec. page 79):

"The Court: Do you care to make any other observations? I will hear them if you do.

Mr. Neale: Just briefly.

The Court: Yes, I will hear you.

Mr. Neale: Throughout the multitude of adjudications considering the law of master and servant are the phrases 'scope of employment,' 'scope and authority,' 'in furtherance of the master's business' or 'Within the relation of master and servant,' and in fact, there are a few cases in other jurisdictions, the intendance on these phrases in novel. Such are not the cases in Illinois and in many foreign jurisdictions. The courts are agreed on the import of law.

In this state, it is held that the intendments of these various phrases is to say that the master must answer for the deeds of his servant in whatsoever he may do, from whatsoever motive he may act, that the servant is doing the work of the master notwithstanding the act of the servant may be wanton, or wilful; that the master, with the right to direct and control his manner of doing it, he ought to answer to others for whatever injury is suffered by reason of what the servant does, or the manner he does it.

In conclusion, I think this is a jury question for this jury to decide."

We respectfully point out that at this closing point of the case in the trial court, counsel for Plaintiff did not suggest or intimate by a single word, argument or authority cited that they were seeking to recover from the Defendants for an alleged breach of contract.

The trial court, counsel for both sides and the Court of Appeals did not misapprehend or misconstrue the pleadings, evidence or arguments. The present line of reasoning is an afterthought; is far fetched and is not substantiated by the record.

The statement of the case in Petitioner's Brief is so vague and indefinite and presented in a distorted manner and at the risk of repetition, we take the liberty of presenting to the Court a concise, complete and connected statement of the proceedings as they were unfolded in the Trial Court.

A contract was entered into between the parties as follows (Rec. 82, 83, 84):

"AGREEMENT.

Chicago, Illinois
Date: 2/27/43

The following agreement is entered into by the William J. Burns International Detective Agency and the Apex Smelting Company, Chicago, Illinois.

The William J. Burns International Detective Agency agrees to furnish to the Apex Smelting Company a uniformed armed guard service consisting of five (5) armed guards, or more as may be agreed upon from time to time between the parties, for the protection of its property, make suggestions to relieve hazards that are found to exist, and at all times endeavor to improve the service.

Such guards are to be guided by a set of general rules and written instructions issued by said Apex Smelting Company through its designated representatives.

The said Agency agrees to furnish uniforms and equipment, including side-arms, belts, holsters and badges without cost to said Apex Smelting Company. Further, said Agency assumes the Social Security, Unemployment Taxes and Employer's Liability Insurance.

The supervision of the guards will be the responsibility of a designated representative of the Agency, who in turn will be responsible to and receive instructions from designated representatives of the Apex Smelting Company.

All uniformed representatives of the Agency will carry out the function of guarding the plant of the Apex Smelting Company in the manner best suited, depending upon the circumstances. The guards will either be stationed at designated points or, if necessary, maintain a constant patrol. It is further understood that guard service will be furnished over such hours agreed upon by the parties hereto, but at no time is the total number of guard hours to be less than 280 hours per week.

It is further agreed that the wishes of said Apex Smelting Company will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirements of the service as outlined.

It is agreed that said Apex Smelting Company will give said Detective Agency sufficient time after acceptance of contract to arrange intelligently the force to be detailed and to properly outfit such representatives so that their appearance will reflect favorably upon both parties to the agreement.

It is also understood that the Apex Smelting Company will not hire for their employment for a period of at least one year after the discontinuance of this service any employee of said Detective Agency.

For this service the Apex Smelting Company is to pay to the William J. Burns International Detective Agency the sum of ninety cents (90¢) per hour per guard and $1.10 per hour for the guard supervisor.

The supervisor in charge of the guard force, to work

one eight-hour shift daily and be responsible at all times for the proper functioning of the operation. These hourly charges are to be made without regard to any overtime charges which must be paid by the Agency to its employees. The Agency will furnish the Apex Smelting Company with daily time sheets and invoice the Apex Smelting Company on the first of each month.

The above service will begin on Monday, February 15, 1943, at 6:00 A. M. and shall remain in force until the expiration of a thirty (30) days' written notice by either or both parties to the agreement whose signatures are appended below.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY,
By A. R. LAPITZ,
Manager.

THE APEX SMELTING COMPANY,
By F. N."

The defendants in pursuance of said agreement furnished to the plaintiff guards for use in guarding the plant. On September 8, 1946, one Harry Frontczak, a guard, wilfully and maliciously set three fires on the property of the plaintiffs (Rec. 37, 38). Thereafter, the said Harry Frontczak admitted setting the fires and was indicted and found guilty by the Criminal Court of Cook County, pursuant to a complaint filed by a representative of the Apex Smelting Company (Rec. 42, 43).

The evidence further showed that before the said guard was employed by the defendants he was employed by the Government of the United States in various capacities, that is, the Army Air Forces in the Stevens Hotel, for over a year, and left when that job terminated (Rec. 43), the Bureau of Internal Revenue, six months, and left when that job terminated (Rec. 39), the Post Office at Chicago for over two years until that job terminated (Rec. 32).

A complaint was filed in the Superior Court of Cook County, Illinois, and although all the defendants were non-residents of the State of Illinois and were residents and citizens of the State of New York and not served with process, they voluntarily appeared and removed the cause for trial to the United States District Court for the Northern District of Illinois (Rec. 7, 8, 9, 10, 11).

The complaint alleged that the plaintiff was the owner and in possession of certain premises commonly known as 2515-2561 West Taylor Street and 2554-2560 West Fillmore Street, situate and being in the City of Chicago, County of Cook and State of Illinois, and was in the exercise of due care and caution for the preservation of such premises from injury and harm, and within the same the plaintiff was active in the conduct and operation of a large and commodious plant in the manufacture of varied and numerous commodities; that its plant might have care and protection from sabotage and other interruption of efficient operation, and moved thereto in consideration thereof, the plaintiff and defendants, on the 2nd day of February, 1943, entered into a certain writing obligatory, in words and figures as follows (The writing referred to is set out hereinbefore in the statement of the case).

That on the 15th day of February, 1943, in strict accord with the terms and conditions thereof, the defendants entered upon the performance of said writing obligatory, and, that the plaintiff might have full care and protection of its plant and efficient operation of the same without interruption, the defendants furnished to the plaintiff an uniformed armed guard service of five armed guards, with a supervisor of the guard force in charge thereof and responsible at all times for the proper functioning of the guard service.

That on or about the 5th day of September, 1946, of these uniformed armed guards, so placed by the defend-

ants in the care and protection of the plaintiff's premises, as aforesaid, one Harry Frontczak, on or about the 8th day of September, 1946, while active in his duties, as the servant of the defendants, in, upon and about the premises of the plaintiff, and coincident therewith, from infirmity of temper, and under the influence of passion aroused by real or fancied grievance, did, wilfully and with intent to wreck vengeance upon the plaintiff, cause combustion to take place within the premises of the plaintiff and a conflagration to ensue thereon, to the harm and injury of said premises and to the contents therein.

That by the combustion caused to take place within the premises of the plaintiff, by the servant of the defendant, and the resulting conflagration thereon, as aforesaid, said premises and the contents thereof were in part consumed by fire; that by the quenching of the flames, said premises of the plaintiff and the contents thereof were harmed from smoke, soot, debris and water incident thereto; that by the restoration and repair of said premises, the plaintiff expended a large sum of money; that by the consequent interruption in the operation of its plant and other work stoppage, the plaintiff was injured by delayed production of its many and varied commodities; and by reason thereof, and of all and sundry, as aforesaid, the plaintiff has suffered great loss, and has sustained damages in the sum of twenty thousand dollars.

Wherefore, the plaintiff prays judgment against the defendants for the sum of Twenty Thousand Dollars, and for the costs of this action (Rec. 2, 3, 4, 5).

A motion was filed by the defendants to strike the complaint and dismiss the cause on the following grounds that:

The complaint does not charge any act of negligence against the defendants or any one of them;

The complaint does not charge any damage was suffered by the plaintiff through the negligence of, or as a direct and proximate result of any negligence on the part of these defendants or any one of them;

The complaint does not charge any breach of contract on the part of these defendants or any one of them;

The complaint does not charge any cause of action against these defendants or any one of them;

The complaint does not charge that the alleged damage sustained by the plaintiff was caused as a direct and proximate result of any negligence or breach of contract by any of the defendants' agents, servants or employees acting within the scope of such agent's, servant's or employee's authority or scope of employment;

Wherefore, the defendants say that the plaintiff is not entitled to any of the relief prayed for in the complaint in that said complaint is insufficient in law to maintain its action and that the same and each and every paragraph thereof should be dismissed at plaintiff's costs (Rec. 12, 13).

Thereafter, the Court ordered briefs to be filed by both sides, and after consideration of the same by the Court, an order was entered denying the motion to strike and dismissing the cause without prejudice to the right of the defendants to renew said motion on the same grounds at the end of the plaintiff's case on the trial of this cause (Rec. 15).

Thereafter, the defendants filed an answer in which they denied the allegations contained in paragraphs numbered 4 and 5 of the complaint and averred that any of the acts complained of were unauthorized by the said defendants, or were the said acts complained of incident to the employment of said guard, and further denied that any of the loss or injury complained of was done or caused by these

defendants, or through any of its agents or servants acting within the scope of their respective employment.

It further alleged that the complaint does not charge any act of negligence against the defendants or any one of them; that the complaint does not charge any damage was suffered by the plaintiff through the negligence of, or as a direct and proximate result of any negligence on the part of these defendants or any one of them; the complaint does not charge any breach of contract on the part of these defendants or any one of them; that the complaint does not charge any cause of action against these defendants or any one of them; that the complaint does not charge that the alleged damage sustained by the plaintiff was caused as a direct and proximate result of any negligence or breach of contract by any of the defendants' agents, servants or employees acting within the scope of such agent's, servant's or employee's authority or scope of employment.

There was never any claim in the Trial Court that the Defendants charged themselves with a duty or obligation to be performed which they did not perform, or performance which was rendered impossible by an Act of God.

Defendants, by their contract, plaintiffs' Exhibit 1 (Rec. 3, 82), agreed to furnish to the plaintiff a uniformed armed guard service consisting of five armed guards, or more as may be agreed upon from time to time between the parties, for the protection of its property, make suggestions to relieve hazards that are found to exist, and at all times endeavor to improve the service, and the parties hereto further agree "Such guards are to be guided by a set of general rules and written instructions issued by said Apex Smelting Company through its designated representatives." (Rec. 82).

The agreement further provided that the said defendants agreed to furnish uniforms and equipment, including side-arms, belts, holsters and badges without cost to the

said plaintiff and agreed to assume Social Security, Unemployment Taxes, etc.

The agreement further provided "The supervision of the guards will be the responsibility of a designated representative of the Agency, who in turn will be responsible to and receive instructions from designated representatives of the Apex Smelting Company." (Rec. 3, 83).

The agreement further provided "It is further agreed that the wishes of said Apex Smelting Company will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirements of the service as outlined." (Rec. 4, 83).

The evidence showed that this contract has never been terminated and is still in full force and effect (Rec. 57).

Mr. William R. Bayer, who is the comptroller of the plaintiff corporation, testified that if any request was made to remove any guard, that the defendants would remove them, and further, that the plaintiff corporation prescribed all the rules and regulations under which the guards worked (Rec. 58).

It can be seen, therefore, from the contract between the parties, in evidence, and the method of procedure followed by the parties hereto, that all of the guards were supervised by the representative of the defendants, who in turn were responsible to a duly authorized representative of the plaintiff. Therefore, the guards were actually directed in their work, when employed on the premises, by the plaintiff herein.

The defendants were not negligent in any way in the hiring of the said Harry James Frontczak, who was the guard in question. The record shows that the said Harry James Frontczak was gainfully employed by the Govern-

ment of the United States in various capacities and had a good service record. The testimony further showed that the said Harry James Frontczak, because of some disagreement or fancied grievance against the plaintiff, deviated from his employment and set fire to the plant of the plaintiff, for which he was apprehended on the complaint of plaintiff's representative, tried and convicted in the Criminal Court of Cook County. It cannot be said that the action of the said guard in setting the fires was in any way connected with or in the scope of his employment so as to charge the defendants with a breach of their contract with the plaintiff.

The case of *Deibler* v. *Bernard Bros. Inc.*, 385 Ill. 610, 615, cited by the plaintiff in its Brief, pages 44, 67 and 68, is not in point. It that case, because of commercial frustration due to World War II, the defendants attempted to be relieved of their contractual liability under a lease for certain premises. The Court properly held that because the lease did not limit the use of the premises, as contended for by the defendants, the defendants could use the premises for other purposes, and therefore, because no automobiles could be sold, the premises could be used for other gainful purposes, and the decision further held that the lease was not terminated by reason of the war, but was in full force and effect.

Therefore, the principles outlined in the Deibler case cannot be a precedent for holding that where the defendants agreed to furnish guards to the plaintiff, which guards were under the supervision of the plaintiff and operated under rules and regulations of the plaintiff, that because a guard deviated from the duties imposed upon him, it could be said that the defendants were liable under the contract for the damage occasioned by the said guard outside the scope of his employment.

It is unusual to ask the Court of Appeals and this Court

to correct an alleged erroneous ruling by a Trial Court on a proposition of law which was never presented to it for hearing and determination, that is, the failure of the performance of the contract between the plaintiff and defendants, where, as a matter of fact, the plaintiff's entire theory in the Trial Court was on the theory of negligence on the part of Harry Frontczak, as an alleged agent and servant of the defendants, who occasioned damage when acting outside the scope of and not in the performance of his duties, and the entire argument of plaintiff's counsel in the Trial Court was directed to the theory of negligence, including the precedents cited in support thereof (Rec. 71-75, 79).

All of the other cases cited by counsel in his Petition for the allowance of the Writ have no bearing on the issues involved in this case. Counsel states that the District Court and the Court of Appeals were in obfuscation and confusion but there is nothing in the record to substantiate this charge. Apparently the only one suffering from obfuscation and confusion are counsel themselves. The issues in the Trial Court were clear and unmistakable. Counsel for the Plaintiff was asked by the Trial Court if he had anything further to offer or say. They held fast to their position of negligence and respondeat superior. The first inkling of any shift in their position was in the Court of Appeals, where they attempted to review for the first time an issue of contract and bailment. The Court of Appeals correctly decided that they could not review something which had not been presented to the Trial Court and in their opinion stated (Rec. 105, 106 and 107):

> "We agree with the lower court that there was no basis for recovery upon the theory of negligence. Plaintiff's evidence showed that Frontczak had been employed by the government in various capacities in handling its mail, finances, records and personnel during the time of war. Under such circumstances, we

think there was no negligence in his employment by defendants. More than that, plaintiff had an equal opportunity to observe his conduct, as well as that of all other guards, and it did not complain or request his removal. We also agree that in setting the fires he was not acting within the scope of his employment or in furtherance of the master's business. See *Boehmer* v. *Norton,* 328 Ill. App. 17, 21; *Horecker* v. *Pere Marquette R. Co.,* 238 Ill. App. 278, 281.

We need not pursue this negligence theory further, however, because it is no longer relied upon. Here, for the first time plaintiff advances the theory that defendants were liable for breach of contract. As already noted, no such breach was alleged in the complaint and the record is plain that such a theory was not relied upon below. Neither is the liberalized rule which permits the amendment of a pleading to conform to the proof of any benefit to plaintiff. No such amendment was proposed, but even if it had been we doubt if it could have been properly permitted in view of plaintiff's proof. As the court stated in *Hart* v. *Knox County,* 79 F. Supp. 654, 658:

'The effect of the amendment they propose would be not to conform the pleadings to a judgment they have won, but to jeopardize and perhaps to overthrow a judgment they have lost. * * * If this latter application of the rule were permitted, a losing party, by motions to amend and rehear, could keep a case in court indefinitely, trying one theory of recovery or defense after another, in the hope of finally hitting upon a successful one.'

Plaintiff's breach of contract theory is far fetched. It goes to the extent that the defendants by the contract were given complete custody and control of plaintiff's plant and likens the contract to one of bailment. The premise upon which this argument proceeds is, in our judgment, unsound. It must be remembered that by the terms of the contract 'Such guards are to be guided by a set of general rules and written instructions issued by said Apex Smelting Company through its designated representatives. * * * The su-

pervision of the guards will be the responsibility of a designated representative of the Agency, who in turn will be responsible to and receive instructions from designated representatives of the Apex Smelting Company. * * * It is further agreed that the wishes of said Apex Smelting Comapny will be honored at all times consistent with good judgment in replacing representatives who in their opinion do not fulfill the requirements of the service as outlined.' As stated by the court below, 'Here is a guard who is employed and directed partially by the plaintiff and partially by the defendant—true, the employment is that of the defendant—but he is directed partially by both, to protect this property properly.' Thus, not only did the plaintiff under the terms of the contract retain possession and control of its premises but it retained a large measure of control over the guards furnished by the defendants, including Frontczak.

Finally, if we were impressed with the theory of liability argued before this court, which we are not, we would not be justified in reversing the judgment because the case was neither tried nor decided below on such theory. As was said in *Helvering* v. *Rubinstein*, 124 F. 2d 969, 972:

'The rule that an appellate court will not ordinarily consider questions not tried below is an important rule of appellate procedure and one which is usually not unjust to litigants. It requires them to deal fairly and frankly with each other and with the trial tribunal with respect to their controveries. It prevents the trial of cases piecemeal or in installments. It tends to put an end to litigation.' "

And as said by this Court in *Maloney* v. *Brandt*, 123 F. 2d 779, 782:

"It has long been a rule of practice that a reviewing Court will not consider assignments of error not called to the attention of the trial court where such matters do not concern the jurisdiction of the court. It would manifestly be unfair to hold that the trial court had erred in a matter it had not considered. Litigants are

not entitled to hide a point in an obscure pleading and present it for the first time on review, but should fully and fairly acquaint the trial court with all matters relied upon.

This rule announced in the *Maloney* case was cited with the approval by this court in *Chatz* v. *Midco Oil Corp.*, 152 F. 2d 153, 154. In fact, the cases are legion where the same or a similar rule has been announced and followed. *Thomas* v. *Taylor*, 224 U. S. 73, 84; *Cold Metal Process Co.* v. *Mc-Louth Steel Corp.*, 170 F. 2d 369, 380; *Hebets* v. *Scott*, 152 F. 2d 739, 741; *Saulsbury Oil Co.* v. *Phillips Petroleum Co.*, 142 F. 2d 27, 34."

The evidence as set out in the Petitioner's Brief is substantially correct and is therefore not repeated.

Petitioner has not shown to this Court by its Petition why the decision was erroneous or in conflict with the decisions of any other Court of Appeals or of any public importance nor have they shown any reason why the case should be subject to further review in this Court.

OPINIONS OF THE DISTRICT COURT AND COURT OF APPEALS.

The District Court's consideration and determination of this case are correctly set forth in its order directing the jury to find for the defendants and dismissing the case (Rec. page 81). They are not subject to the strained interpretation which Petitioner asserts and attempts to demonstrate from a consideration of the evidence, the pleadings in the case, the position of the respective parties, on theory the case was being tried were correctly determined by the Trial Court. In short, it was determined that under the evidence and the pleadings, the Plaintiff was solely relying on the theory of negligence and *respondeat superior* and was not relying on the contract, bailment or independent contract or theory as now asserted in the Court of Appeals and in this Court.

In the Court of Appeals, for the first time, the Plaintiff advanced a new theory, that is, of breach of contract and bailment to impose liability on the Defendants and has abandoned its theory of negligence.

The opinion of the Court of Appeals correctly interpreted the position of the respective parties on the trial of the cause and further, by its opinion, that the action of the Trial Court was correct.

THE TRUE ISSUE INVOLVED.

1. Was Harry Frontczak acting within the scope of his employment when he set the fires, to the extent that the employers are required under the doctrine of *respondeat superior* to make good any damages for a deliberate disobedience to orders.

2. Was Harry Frontczak on a lark of his own when he set the fires complained of and therefore acting outside of the scope of his employment.

3. Was Harry Frontczak acting within the scope of his employment when he committed the crime of arson, and were the employers liable for the damage occasioned by the commission of said crime.

4. Was there any negligence on the part of the said defendants which caused the damage complained of.

THE REASONS GIVEN BY PETITIONER FOR THE ALLOWANCE OF THE WRIT ARE WITHOUT MERIT AND ARE INSUFFICIENT.

1. The decision of the Court of Appeals in affirming the order and judgment of the District Court is not in conflict with the decisions of any Court of review or of this Court and correctly follows the established laws of the State of Illinois and of the United States.

The decision of the Court of Appeals in this case is not erroneous and correctly decided the issues presented to it for review.

ARGUMENT.

I.

There is no question but that the law of the State of Illinois is to be applied to the case at bar and respondents have never contended that any other laws were applicable.

II.

Point Two (2) of Petitioner's Brief Pages 49-57:

Petitioner's arguments under this point are directed to the proposition that there was a contract between the parties and that as a result of the contract, plaintiffs are liable to it irrespective of the charges made in complaint filed in this cause on which recovery is predicated.

None of the cases cited under Point II by the Petitioners are applicable to the facts in this case. There was never any claim or argument in the Trial Court that the Plaintiff was seeking to recover on the contract but the entire theory in the Trial Court was one of negligence of an alleged agent or servant of the Defendants.

As a matter of fact, this change in theory was first made on appeal, and was so recognized by the Court of Appeals in the opinion, and stated that the plaintiff had abandoned its theory of negligence and have now relied on a theory of contract, and that theory was far fetched.

We cannot understand by what stretch of the imagination, evidence or pleadings, the charges of Petitioner that the courts are in confusion as to what they were trying to do.

The only relation of the parties in this law suit was not on contract but the question of liability for the alleged

negligence or wilful conduct of one of the defendant's servants.

The authorities cited by the Petitioner failed in every particular to carry out the theory which they promulgated in the Trial Court and has no application to the evidence and pleadings in the record.

III.

Point Three (3) of Petitioner's Brief, Pages 57-63:

Petitioners argument under this point is directed to the form of pleadings under the rules of Civil Procedure. We have no quarrel with the rules or with the cases cited thereunder, however, before there can be any recovery, a charge must be made in a complaint upon which recovery can be predicated.

In the case of *Hart* v. *Knox County*, 79 F. Supp. 654, 658, the court said:

> "The effect of the amendment they propose would be not to conform the pleadings to a judgment they have won but to jeopardize and perhaps to overthrow a judgment they have lost. * * * If this latter application of the rule were permitted a losing party, by motions to amend and rehear, could keep a case in court indefinitely, trying one theory of recovery or defense after another, in the hope of finally hitting upon a successful one."

In the case of *Helvering* v. *Rubinstein*, 124 F. 2d 969, 972, the court said:

> "The rule that an appellate court will not ordinarily consider questions not tried below is an important rule of appellate procedure and one which is usually not unjust to litigants. It requires them to deal fairly and frankly with each other and with the trial tribunal with respect to their controversies. It prevents the trial of cases piecemeal or in installments. It tends to put an end to litigation."

In the case of *Maloney* v. *Brandt*, 123 F. 2d 779, 782, the court said:

> "It has long been a rule of practice that a reviewing Court will not consider assignments of error not called to the attention of the trial court where such matters do not concern the jurisdiction of the court. It would manifestly be unfair to hold that the trial court had erred in a matter it had not considered. Litigants are not entitled to hide a point in an obscure pleading and present it for the first time on review, but should fully and fairly acquaint the trial court with all matters relied upon."

The rule in the *Maloney* case was cited with approval in the case of *Chatz* v. *Midco Oil Company*, 152 F. 2d 153, 154.

The same rule was announced in *Thomas* v. *Taylor*, 224 U. S. 73, 84; *Cold Metal Process Co.* v. *McLouth Steel Corp.*, 170 F. 2nd 369, 380; *Hebets* v. *Scott*, 152 F. 2d 739, 741; *Saulsbury Oil Co.* v. *Phillips Petroleum Co.*, 142 F. 2d 27, 34.

IV.

Point Four (4) Petitioner's Brief, Pages 63-71:

The argument made by Petitioner under this point has no application to the case at bar in that they are arguing a proposition which was not presented to the Trial Court and which they tried to present to the Court of Appeals and their claim was rejected.

V.

Point Five (5) Petitioner's Brief, Pages 71-92:

As we have previously stated in our argument, here is an employee of the Defendants, partially directed by each of the parties hereto, who commits a crime outside the scope of his employment.

Petitioner under this point selects parts of sentences in parts of the contract and attempts by innuendo to find a phrase or word which would make the Defendants liable for the unauthorized act of an unfaithful servant. The contract in question if it is to be considered at all, must be read and construed in its entirety. Here, the defendants were obligated to furnish men, uniforms, side-arms, for those hours and over those periods of time as mutually agreed upon between the parties. The defendants were to pay the Social Security and other taxes. The guards, however, were to be guided by the rules and regulations promulgated by the petitioner, and not by the defendants. The supervision of the guards was to be the responsibility of a designated representative of the defendants, who in turn was responsible to and received instructions from the designated representatives of the petitioner. Not only that, but if the petitioner desired that any of the guards assigned to the plant by the defendants be removed and replaced, the said defendants were obligated to do so.

The Petitioners did not show by a scintilla of evidence in the record, or by any charge made in the complaint filed, that the defendants were negligent in any way in the hiring of the guard, or in any other manner, or that their agents and servants, within the scope of their employment, were negligent in any way, causing the damages complained of.

The authorities cited by the Petitioner under this Point of its Brief are not analogous to the situation herein involved. They cite the case of *Vannah* v. *Hart Private Hospital,* 228 Mass. 132, 117, N. E. 328, 329, 330, in which a person who is in surgery under the influence of ether and had a ring stolen from her finger by one of the nurses, and the hospital was held liable because they agreed to give the plaintiff in that case such services as were necessary and proper while under the influence of ether, so that they stood

in an entirely different contractual situation than do the defendants in this case.

Petitioner cites the case of *Evans* v. *Williams*, 232 Ill. App. 439, 443, which is no authority for the proposition Petitioner contends for, because the bailee's servant, without authority to do so, took the bailor's car out for a "joyride" and wrecked it. The decision in that case rested wholly upon the question of negligence and in no way involved a crime of a servant.

The Petitioner contends that the plant was turned over to the defendants under the contract in question and contends, therefore, that under the *Evans* case cited by it, the defendants became the bailors of the Petitioner's plant. This is so far fetched that it requires no answer except to say that under the contract the defendants merely furnished men to the Petitioner, and it directed the entire operation, and it was in charge of and had exclusive control of its own plant, and not the defendants.

To the same effect are all of the other authorities cited by the Petitioner under this point on the question of bailments. No question of bailment is involved in the case before the Court. In this case the defendants agreed under their contract to furnish guards and uniforms to the Petitioner, and the plant and property, and even the guards furnished, were under the jurisdiction, direction and control of the Petitioner, and not of the defendants, and certainly, there was no bailment of the premises to the plaintiff, especially at the time of the fire.

VI.

Point Six (6) Petitioner's Brief, Pages 93-112:

Petitioner argues under this point that the respondents were independent contractors and that there was no divided control. This is so far from the evidence adduced or the

pleadings in the case as to require no answer. The Court of Appeals correctly stated that the new theory of contract advanced by the Petitioners was far fetched. The authorities cited under this point are not in point or authority for the proposition advanced by the Petitioner and requires no further reply.

VII.

Point Seven (7) Petitioner's Brief, Pages 112-117:

Petitioner did not make out a prima facie case as a matter of law, by showing that Harry Frontczak set the fires that caused the damage in Petitioner's plant, unless as a matter of law the said Harry Frontczak was acting within the scope of his employment, and it was not necessary for the Defendants as a matter of law to make excuses or justifications for the unauthorized act of Harry Frontczak, if any existed.

Petitioner cites the case of *Johnson* v. *Barber*, 10 Ill. 425, 431, as authority for the proposition advanced under this point. However, the said case holds contrary to the Petitioner's contention. That case holds as Defendants have contended in the trial Court and in the Court of Appeals and now contend. The Court said in that case on page 431:

> "If one of the Defendants, while engaged in the prosecution of the business of the other, carelessly or negligently set fire to the prairie, or even purposely, with a view to benefit or protect the interests of the employer, the latter would be liable for the consequences; but if he set out the fire from motives of malice or wantonness, the principal would not be liable, for that would be an abandonment of the business of the agency. The instruction, as modified by the court, stated the law correctly."

The other cases cited by counsel under this point do not support their position.

VIII.

Point Eight (8) Petitioner's Brief, Pages 118-126:

We cannot see how counsel for Petitioner contends that the theory in the District Court and in the Court of Appeals and in this Court is one of contract and that they did not rely on the negligence theory. The Petitioner did not at any time during the proceedings in the Trial Court rely on contract. The Petitioner in its complaint did not make a charge against the defendants of any negligence, or that the act complained of was done by any of the defendants' agents or servants in the course of, or in the scope of their employment. The evidence adduced by the Petitioner on the trial of the case did not show any negligence, as a matter of law, on the part of the defendants, either in the hiring of the said Harry James Frontczak, or that any act that he did was done in the furtherance of the master's business. As a matter of fact, the evidence showed to the contrary, that the defendants, as a matter of law, hired this guard after they had found that the said guard had been employed by the Government in various capacities; that employment with the Government over a period of time handling the Government's mail, the Government's finances, the Governments' records, and the Government's personnel, during time of war, was a sufficient recommendation for the defendants to employ this particular guard. The Petitioner, who had more of an opportunity to observe the conduct of this guard, and all the other guards, did not complain, nor did they request his removal. Where, then, can it be said that the defendants were negligent? Further, the contention of the Petitioner that the guard set these fires in the scope of, or in the course of his employment or furthering the business of the employer, is so far fetched that it does not require any answer. There can be no question in the record before the Court that the

guard deviated from the course of, and the scope of his employment; that when he set these fires he committed a felony, for which he was indicted on the complaint of the Petitioner in this case, and tried and convicted. Can the defendants be held to answer for the crime of the said Harry Frontczak when it was not done in the furtherance of the masters' business? The Courts have repeatedly held and as ably stated by the Appellate Court of Illinois, in the case entitled *Boehmer* v. *Norton,* 328 Ill. App. 17, 65 N. E. 2nd 212, at page 214:

> "The law is well stated in the following excerpt from Sec. 556, Vol. 35, American Jurisprudence:
>
> When the deviation and its purpose are not in dispute, and it appears beyond reasonable controversy that the purpose had no connection with the duties of the servant, there is no liability, and it is the duty of the court to dismiss the action or direct a verdict, or, if a verdict has been rendered in favor of the plaintiff, to set is aside on motion. On the other hand, in cases where the deviation is slight and not unusual, the court may, and often will, as a matter of law, determine that the servant was still executing his master's business. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such question."

In the case of *Horecker* v. *Pere Marquette R. Co.,* 238 Ill. App. 278, at page 281, the court said:

> "In Wood on Master & Servant, sec. 286, p. 552, the author says: 'A Master is liable for the act of his servant, done in the course of his employment about his master's business. But he is not responsible for an act done outside of his employment, nor for the wanton violation of the law by him.' The author further says, sec. 307, p. 585: 'By putting the servant in his place, he becomes responsible for all his acts within the line of his employment, even though they are willful and directly antagonistical to his orders.

The simple test is, whether they were acts within the scope of his employment,—not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him.' In 3 Elliott on Railroads (3rd Ed.), pp. 892-95, sec. 1805, in treating of the liability of a railroad company for acts of its employees to others than passengers, the author says: 'The general rule is that a master is liable for the wilful acts of his servants if done in obedience to the master's order or within the scope of their employment or line of their duty, but not otherwise. * * * If an employee steps aside from the line of his duty and commits an independent tort on his own account and outside of the scope of his employment the master is not liable therefor. Thus a railroad company is not liable for injuries inflicted by an employee in a purely personal quarrel with one between whom and the corporation there is no connection or privity, nor for an assault by a trainman on one who had been a passenger but had left the train and ceased to be a passenger at the time of the assault.' In the above quotations from the two textwriters are set forth what is substantially, as we understand it, the law in Illinois and other jurisdictions. (*Oxford* v. *Peter*, 28 Ill. 434, 435; *Johanson* v. *Johnston Printing Co.*, 263 Ill. 236, 240; *Illinois Cent. R. Co.* v. *Ross*, 31 Ill. App. 170, 182; *Stephenson* v. *Southern Pac. Co.*, 93 Cal. 558, 561; *Central Ry. Co.* v. *Peacock*, 69 Md. 257, 262; *Genga* v. *Director General of Railroads*, 243 Mass. 101, 106; *Kinnomen* v. *Great Northern R. Co.*, 34 N. Dak. 556, 565; *Roberts* v. *Southern R. Co.*, 143 N. C. 176, 181; *Turner* v. *American Dist. Telegraph & Messenger Co.*, 94 Conn. 707, 713; *Bowen* v. *Illinois Cent. R. Co.*, 136 Fed. 306.) In the *Johanson* case, *supra*, our Supreme Court says: 'Outside of the scope of his employment the servant is as much a stranger to his master as any third person, and an act of the servant not done in the execution of services for which he was engaged cannot be regarded as the act of the master. If the servant step aside from his master's business for some purpose

wholly disconnected with his employment the relation of master and servant is suspended. The act of the servant during such interval is not to be charged to his master.' In the *Bowen* case, *supra,* decided by the U. S. Court of Appeals for the 8th Circuit, the distinction is pointed out, as affecting a master's liability, between an act done by a servant during his employment, and an act done by him within the scope of his employment, and attention is directed to the further distinction to be observed, as to the liability of the master for the wrongful act of the servant, between cases where the relation of carrier and passenger, or of a hotel keeper and his guest, exists, and cases where the master is the proprietor of a business house or railroad station and the persons injured by the servant's wrongful act comes upon the premises to transact some matter connected with the master's general business.

In view of the above authorities and the undisputed facts of the present case, we are of the opinion that the defendant railroad company is not liable for the injuries received by plaintiff in the manner shown, and that the circuit court committed errors of law in refusing on defendant's motions to direct a verdict in its favor and in entering the judgment appealed from, or any judgment, against it. It seems clear to us from the evidence that the wrongful assault of the two gatemen was without the scope of their employment or duties, and, as said in the *Genga* case, *supra,* was committed by them 'in a spirit of vindictiveness, or to gratify personal animosity or to carry out an independent purpose of their own'; and that the judgment appealed from should be reversed without remanding the cause. Such action is proper where this Appellate Court reverses a judgment 'for errors of law which cannot be obviated or cured on another trial.' (*Harty Bros. & Harty Co.* v. *Polakow*, 237 Ill. 559, 567.)"

From the record made in the Trial Court the Court had no alternative but to find, as a matter of law, that the

Petitioner had not made out a prima facie case, and that the court was duty bound to take the case from the jury and direct the jury to find the defendants not guilty and dismiss the suit. There was no factual issue to be tried, and therefore, if the Court had refused to grant the motion to direct the jury, the Court would have committed error, and even if the jury had returned the verdict for the Petitioner, as a matter of law, the verdict would have had to be set aside.

All of the cases cited on this point were cases where a prima facie case had been made out on questions of fact, and in those cases, the Court would have erred to direct a verdict, but in a case as the case before this Court is, where, as a matter of law, there was no liability, the Court was duty bound and did grant the motion of the defendants.

Conclusion.

The Petition for Writ of Certiorari fails to demonstrate any valid reason as to why this case should be the subject of further review. We, therefore, submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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